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No. 89-369

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The First Circuit

BRIEF FOR THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA AND THE STATES OF CALIFORNIA, CONNECTICUT, IDAHO, ILLINOIS, KANSAS, MICHIGAN, MINNESOTA, NEW YORK, NORTH CAROLINA, VERMONT, AND WASHINGTON AS AMICI CURIAE URGING AFFIRMANCE

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ISSUE PRESENTED

Whether Federal Enforcement of the Existing Provisions of a Clean Air Act State Implementation Plan Is Barred Pending Completion of the United States Environmental Protection Agency's Review of a Proposed Revision to the Plan?

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INTERESTS OF AMICI STATES

The states that have joined in this brief, like all states, have a fundamental interest in protecting the health and welfare of their citizens. One of the most important ways that states pursue this interest is through preventing air pollution. Moreover, under the Clean Air Act, states have "the primary responsibility for assuring air quality" within their respective borders. 42 U.S.C. § 7407. The fundamental interest that states share in protecting their citizens from air pollution would be served by affirmance of the opinion below.

The Clean Air Act is administered jointly by the states and the United States Environmental Protection Agency (EPA). Particular roles are assigned to each. EPA is required to set national ambient air quality standards (NAAQS) for

designated pollutants. 42 U.S.C. § 7409. Each state is then required to develop and administer state implementation plans (SIPs) setting forth the strategy the state will use to bring its air quality into compliance with the NAAQS and to maintain such compliance thereafter. 42 U.S.C. § 7410.

States must submit their SIPs to EPA for review and approval. 42 U.S.C. § 7410(a)(1). Any proposed revisions to an approved SIP are also subject to EPA approval. 42 U.S.C. § 7410(a)(3). Only after such approval is a SIP or SIP revision effective under the Clean Air Act. Train v. Natural Resources Defense Council ("Train"), 421 U.S. 60, 92 (1975).

EPA must approve a SIP submittal when the agency determines that the submittal would result in timely attainment of the NAAQS and that it otherwise complies with a specified set of statutory

requirements. See 42 U.S.C. §§ 7410(a)(2), 7410(a)(3)(A). EPA may not substitute its judgment for that of the states regarding the particular mix of emissions limitations appropriate for achieving compliance with the NAAQS. Train, supra, 421 U.S. at 79.

Because SIP revisions are effective under the Clean Air Act only after EPA's approval, the role of the states as the primary policy-makers will be preserved only with prompt EPA review. States therefore have a strong interest in ensuring expeditious review of their SIP revisions. The statute addresses this interest by requiring EPA to act on SIP revisions within four months.1/

1/ The Court of Appeals for the First Circuit properly recognized that EPA has a nondiscretionary duty to act on SIP revisions within four months. 876 F.2d at 1066. For the reasons set forth in

(footnote continued)

Where a SIP revision would relax an emissions limitation and where EPA has not acted upon the SIP revision within four months, Petitioner General Motors Corporation ("General Motors") argues that federal enforcement should be barred against a person who is in compliance with the proposed revision until EPA denies the revision. See Brief of Petitioner General Motors Corporation ("Petitioner's Brief") at pp. 20-24.

(footnote continued)

the Brief of Petitioner General Motors Corporation at p. 12, n. 13, the correctness of that ruling is not before this Court. In any event, for the reasons set forth at pp. 13-14 of the petitioner's brief, the ruling is certainly correct. All other circuits that have addressed this issue have come to the same conclusion. See Council of Commuter Organizations v. Thomas, 799 F.2d 879, 888 (2d Cir. 1986); American Cyanamid Co. v. EPA, 810 F.2d 493, 495 (5th Cir. 1987); United States v. Alcan Foil Products, 889 F.2d 1513, 1517-18 (6th Cir. 1989); Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983).

General Motors contends that such an enforcement bar is the only appropriate and meaningful remedy for EPA delay. This contention is based primarily on General Motors' assessment of the states' interests. See e.g., Petitioner's Brief at p. 22 (arguing that enforcement bar follows from state interests, not from unfairness to industry). For the reasons set forth below, amici states disagree with petitioner's assessment. The states submit this brief so that they, and not General Motors, may set forth what is in their interest.[2/]

The enforcement bar that General Motors proposes would have the effect of allowing a state's proposed SIP revision

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2/ In concurring with EPA that the agency's delay should not work an enforcement bar, the amici states do not mean to condone EPA's delay or to minimize the problems that such delay causes the states.

to go into effect without EPA approval. While states, of course, have an interest in seeing that their SIP revisions are federally approved, it does not follow that states also have an interest in allowing such revisions to go into effect without EPA's approval. EPA's review and approval directly benefits a state by ensuring that relaxation of a particular emission limitation will not prevent the state from coming into compliance with the NAAQS.[3/]

3/ The differences in the roles assigned to the states and to EPA are very important for some purposes, but they should not be overstated. Ultimately, the Clean Air Act charges both the states and EPA with the same goal: reducing air pollution so as to achieve compliance with the NAAQS. While there will inevitably be tensions between the states and EPA as to how to achieve the goal of clean air, the state and federal agencies should, and generally do, attempt to work together with mutual respect and appreciation for the legitimate role of

(footnote continued)

Moreover, a state proposing a revision and EPA share a strong interest in maintaining respect for compliance with the Clean Air Act. The proposed enforcement bar would undercut this interest by condoning knowing violations of federal law.[4/] For this reason, states have an interest in preserving the enforceability of existing SIP provisions even where they have sought to revise those provisions.

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the other. This relationship has been reflected in the controversy at hand. While Massachusetts and EPA have a reasonable difference of opinion regarding approval of the particular SIP revision at issue, the relationship between them has been one of respect.

4/ As discussed below in Part I of the Argument, the existing SIP provisions remain the federal standard with which industry must comply.

Any proper analysis of state interests must consider not only the interests of the state proposing the SIP revision, but the interests of other states as well. Air pollution ignores state boundaries. As a result, states that are downwind of a state seeking to relax an emissions limitation have an important stake in strong EPA oversight of the proposed revision. For the same reason, downwind states also have a strong interest in preserving the enforceability of the existing SIP provisions pending completion of EPA review.

Furthermore, states compete for industry. This creates economic pressure for states to reduce the level of air pollution regulation in order to attract or to keep "smoke stack industries." EPA oversight helps police this interstate competition. See e.g., United States v.

Ford Motor Co., 814 F.2d 1099, 1102 (6th Cir. 1987)(without federal oversight, "major shifts of smoke stack industries to states with the most lenient pure air standards would inevitably take place").[5/] Therefore, even states that are upwind of the state seeking to revise its SIP have an interest in increased federal supervision, not less. For the same reason, upwind states also have an interest in the continued enforceability of the existing SIP while the proposed revision is under

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5/ See also Duquesne v. EPA, supra, 698 F.2d at 471 (recognizing EPA's role "to ensure national uniformity where needed, for example, to ensure that states do not compete unfairly for industry by offering air quality standards that are too lax to bring about needed improvements in the air we breath").

review.[6/]

In sum, states have a strong interest in EPA acting promptly, but it does not follow that the enforcement bar proposed by General Motors is also in their interest. States have an independent interest in preserving the enforceability of an existing SIP while a proposed revision is under EPA review. This interest would be directly undercut by General Motors proposed remedy. The amici states therefore ask this court to decline General Motors' invitation to create the proposed enforcement bar and instead to affirm the decision of the Court of Appeals for the First Circuit.

6/ A state prevented from putting its SIP revision into effect without EPA approval achieves a reciprocity of benefit from the fact that other states find themselves in the same position. What states gain from this arrangement overcomes any special interest states have in seeing SIP revisions go into effect without EPA approval.

SUMMARY OF ARGUMENT

Under the plain language of the Clean Air Act, there can be no doubt that an existing SIP remains in effect until EPA approves a proposed revision. In the interim, EPA delay in reviewing the proposed revision should bar the agency from enforcing the existing SIP only if Congress clearly intended such a result. The language and intent of the statute demonstrate that an enforcement bar was not intended. This is further evidenced by the fact that the statute itself sets forth a less drastic remedy for EPA inaction.

The enforcement bar requested by General Motors is not only unfounded, it would not serve the purpose for which General Motors claims it was intended. To the extent that the available mandamus remedy would be ineffective in inducing

EPA action, an enforcement bar would also be ineffective.

General Motors, and any other polluter similarly situated, will have every opportunity to argue to the District Court why EPA's actions should diminish the amount of any penalty owed. A per se rule against the imposition of penalties is unnecessary and inappropriate.

ARGUMENT

FEDERAL ENFORCEMENT OF THE EXISTING SIP PROVISIONS IS NOT BARRED PENDING COMPLETION OF EPA REVIEW OF A PROPOSED REVISION.

I. Until EPA Rules on a SIP Revision, the Existing SIP Remains In Effect.

The language of the Clean Air Act makes clear that until a proposed revision has been finally approved by EPA, the existing SIP continues to be the federal standard with which industry must

comply.[7] This Court has explicitly recognized this principle. See Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975)(polluter subject to the requirements of an existing SIP until a SIP revision has been approved by both the state and EPA). Other federal courts have unanimously come to the same conclusion.[8] See e.g., U.S. v.

7/ Failure to comply with an "applicable implementation plan" is a violation of federal law. 42 U.S.C. § 7413. The "applicable implementation plan," is "the implementation plan, or most recent revision thereof, which has been approved [in accordance with the statutorily mandated procedures]." 42 U.S.C. § 7410(d). These procedures include approval by both the applicable state and EPA, except in limited circumstances where EPA itself is authorized to promulgate a SIP in place of a state. 42 U.S.C. §§ 7410(a), 7410(c).

8/ American Cyanamid Co. v. EPA, supra, 810 F.2d at 499-50 and the District Court opinion in the case at hand are not to the contrary. Those opinions held that

(footnote continued)

Ford Motor Co., supra, 814 F. 2d at 1102 (noting "overwhelming authority declaring that revisions of State Implementation Plans are ineffective until approved by EPA").

The principle that a SIP revision is not effective until approved by EPA accords with the role assigned to EPA by the Clean Air Act. While this role may be limited, it is also critically important. The statute gives EPA the primary role in determining whether the revised SIP will result in timely attainment of the NAAQS. Accordingly,

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there were limitations on EPA's enforcing the existing SIP, but they did not hold that this SIP was no longer in effect. In any event, for the reasons set forth in Part II, below, these opinions were wrongly decided.

the statute also recognizes that a proposed SIP revision goes into effect only after EPA determines that the revision will not jeopardize such attainment.9/

Faced with the unambiguous language of the statute and with Train and similar case law, General Motors has not even attempted to argue that a SIP revision

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9/ The statute includes one exception to this general rule. Under certain circumstances where EPA has failed to act on a SIP revision within four months of its submittal, a governor may issue an emergency suspension of the existing SIP in order to keep a plant open, subject to EPA override. 42 U.S.C. § 7410(g). The existence of this explicit exception demonstrates that in all other circumstances, the provisions of the existing SIP remain in effect. As recognized by the First Circuit in the opinion below, the emergency suspension provision evinces a statutory intent that exisiting SIP provisions remain valid and enforceable notwithstanding EPA delay in reviewing any proposed revision. See 876 F.2d at 1069, n. 6.

The emergency suspension provision was not used in the case at hand.

could be effective without EPA approval. Nevertheless, General Motors attempts to achieve exactly the same result through arguing that the existing SIP provisions, while effective, are unenforceable. Through this "sleight of hand," General Motors attempts to make the language of the statute disappear. For the reasons set forth below, the Court should reject this attempt.

II. EPA's Failure to Review SIP Revisions In a Timely Manner Does Not Create A Bar to Federal Enforcement of the Existing SIP.

A. The Clean Air Act Mandates Federal Enforcement of Existing SIP Provisions.

One of the most important changes brought about by the 1970 Amendments to the Clean Air Act was its assigning to EPA a role in enforcing SIPs. This role was greatly strengthened by the 1977

Amendments to the act.[10/] The statute now not only authorizes EPA to enforce applicable SIPs, it compels the agency to do so. See e.g., 42 U.S.C. §§ 7413(a)(1), 7413(b).[11/] There is no language anywhere in the statute that conditions EPA's enforcement mandate on its duty to comply with the four month review deadline.

The statute also mandates that all knowing violations of an existing SIP be

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10/ The 1970 Amendments authorized EPA to issue administrative orders and to seek injunctive relief. See Duquesne v. EPA, supra, 698 F.2d at 463. The 1977 Amendments expanded this power by authorizing the agency to seek civil penalties and to assess administrative penalties. Id.

11/ The statute requires the EPA Administrator to notify persons violating an applicable SIP of their noncompliance. 42 U.S.C. § 7413(a)(1). Where, as here, the violations continue and the polluter is a "major stationary source," the EPA Administrator is required to bring a civil action to enforce the SIP. 42 U.S.C. § 7413(b).

subject to punishment. Pursuant to 42 U.S.C. § 7413(c)(1):

> [a]ny person who knowingly . . . violates any requirement of an applicable implementation plan. . . shall be punished by [listed sanctions including penalties and imprisonment]. [emphasis added].

Here again, the statutory mandate is not in any way connected to, much less conditioned on, the timeliness of EPA review.

B. The Proposed Enforcement Bar Contravenes the Language and Intent of the Clean Air Act, As Well As General Principles Against Forefeiture of the Public Interest.

As discussed above, neither the mandate that EPA enforce the provisions of an existing SIP, nor the mandate that knowing violations of those provisions be subject to punishment, is conditioned on timely EPA review of a proposed revision. In the absence of such language, no such intent should be

inferred. See St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986)(government does not lose jurisdiction over regulated activity for failure to act within a particular time frame unless the statute "both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision")(cited in Brock v. Pierce County ("Brock"), 476 U.S. 253, 259 (1986)).

In Brock, this Court left open the possibility that a bar against government enforcement could be found without explicit language to that effect. Brock made clear, however, that such a bar should not be found absent a showing of congressional intent through indicia other than the plain language of the

statute. This flows from the

> great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.

Brock at 260 (quoting United States v. Nashville, C. & St. L. R. Co., 118 U.S. 120, 125 (1886)).

Far from evincing an intent to bar EPA enforcement, the Clean Air Act demonstrates an intent to compel enforcement. The statute unquestionably mandates that existing SIP provisions remain in effect until proposed revisions are approved by both the state and EPA, and further mandates that knowing violations of those provisions be punished. The suggested enforcement bar would directly contravene this intent by allowing proposed SIP revisions to be effective de facto without EPA approval.

Moreover, another aspect of the Clean Air Act demonstrates that Congress did not intend an enforcement bar. This Court has stated that it will not infer congressional intent to bar governmental enforcement because of agency delay where "there are less drastic remedies available for failure to meet a statutory deadline." Brock, supra, 476 U.S. at 260. Section 304 of the Clean Air Act authorizes aggrieved parties to bring a mandamus action to require EPA to comply with non-discretionary duties, such as its duty to meet statutorily-mandated deadlines. 42 U.S.C. § 7604(a)(2). See e.g., Council of Commuter Organizations v. Thomas, supra, 799 F.2d. at 888 (section 304 provides the remedy for undue delay in EPA's reviewing SIP revisions). The statute thus explicitly provides a remedy for EPA tardiness. Given the availability of this remedy,

courts should not infer a congressional intent to bar EPA enforcement. Brock, supra, at 260.[12/]

General Motors attempts to distinguish Brock and similar cases on the grounds that in those cases, the question was whether the agency permanently lost jurisdiction by its failure to act. See Petitioner's Brief at p. 26. Here, General Motors argues, the issue is "only" whether EPA is temporarily barred from enforcing the SIP until it acts on the revision. Id. This distinction makes no difference. For the period of EPA tardiness, any air pollution that would be allowed under the SIP revision could result in permanent harm that would not be undone by subsequent EPA action.[13/] From

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12/ Congress in fact provided an additional remedy for EPA inaction. As discussed in note 9, supra, the Clean Air Act includes an emergency suspension provision that authorizes a governor to suspend the terms of an existing SIP in limited circumstances, subject to EPA override, in order to keep a plant open. Under the plain language of the statute, a governor can invoke the emergency suspension provision only after the four month deadline for EPA review has run. See 42 U.S.C. § 7410(g). This demonstrates that Congress specifically contemplated that EPA would at times fail to meet the four month deadline and that Congress intended the existing SIP to remain in full force and effect unless an emergency suspension was issued. The Court of Appeals below recognized that General Motors' suggested enforcement bar would render the emergency suspension provision superfluous. 876 F.2d at 1069, n.6.

13/ The consequences of temporary violations should not be underestimated. The NAAQS are health-based standards designed to protect the most vulnerable members of society. See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970)(setting forth a clear intent that the most sensitive individuals be protected). The standards are so important that compliance with them must, for some purposes, be measured on an hourly basis. See e.g., 40 C.F.R. § 50.8(a)(2)(national primary ambient air quality standard for carbon monoxide set forth as a one hour average concentration not to be exceeded more than once per year).

the standpoint of potential harm to the public health during the interim period, therefore, it makes no difference whether the enforcement ban is temporary or permanent. The principles in Brock turn on whether the public interest would be forfeited, not the duration of the forfeiture. These principles dictate that EPA not be barred from enforcing the existing SIP.[14/]

14/ It is not a sufficient answer to note that "citizens" (including downwind states) could sue to enforce the existing SIP provisions even if EPA itself were barred. See 42 U.S.C. § 7604 (citizen suits). Citizen enforcement was intended to supplement EPA enforcement, not to supplant it. This is especially so given that there are substantial "transaction costs" that deter citizen enforcement. Unlike the Clean Water Act, 33 U.S.C. §§ 1251 et seq., the Clean Air Act has no general permit and self-monitoring scheme that would make it readily amenable to citizen enforcement.

C. The Proposed Enforcement Bar Will Not Prompt EPA Action Beyond the Available Mandamus Remedy.

General Motors argues that EPA will have an adequate incentive to act quickly on SIP revisions only if the agency faces an enforcement bar if it does not so act. See Petitioner's Brief, at p. 32. For the reasons discussed below, this argument fails. The remedy that General Motors proposes is therefore not only unfounded, it would not even serve the purpose for which the petitioner claims it was intended.

It is important to keep in mind that under the First Circuit's formulation, EPA will still face the "threat" that its delay will diminish its claim for penalties. See 876 F.2d at 1068-69. Adopting an enforcement bar would simply transform the risk of such a consequence

into a certainty. The incremental effect of this change on EPA's actions is likely to be minimal.[15/]

Where EPA delay is caused by factors within the agency's control, mandamus should be an effective remedy.[16/]

15/ General Motors' asserts that without an enforcement bar, EPA has an affirmative incentive to delay review of SIP revisions in order to build an enforcement case. This fear is unfounded on the current record and it is contrary to the presumption that public officials will act in compliance with the law. See e.g., Northern Cheyenne Tribe v. Hodel, 842 F.2d 224, 229 (9th Cir. 1988). Moreover, any incentive to act in such a manner is removed by the First Circuit's recognition that these actions would diminish EPA's claim for penalties.

16/ Recently, Massachusetts successfully used a § 304 suit to compel EPA action on a SIP revision. Massachusetts v. Reilly, C.A. No. 89-0403-T (D. Mass.). In July

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Indeed, it is difficult to imagine a more effective remedy than threatened contempt-of-court sanctions. General Motors' "scare story" of protracted mandamus litigation is undercut by the inherent simplicity of the mandamus cause of action.[17/]

(footnote continued)

of 1988, Massachusetts submitted to EPA a proposed SIP revision regarding gasoline volatility. The proposed revision was to be effective as of May 13, 1989. When EPA delayed ruling on the revision, Massachusetts brought its mandamus suit in February of 1989 and promptly filed a Motion for Summary Judgment the following month. EPA approved the revision in April, prior to the hearing of Massachusetts' motion. See 54 Fed. Reg. 19173 (May 4, 1989).

17/ Because EPA has a nondiscretionary duty to act on SIP submittals within four months, in order to succeed in a mandamus suit, a plaintiff would merely have to prove that a SIP revision had been submitted, that more than four months had passed, and that EPA had not yet acted.

Mandamus suits do not provide an effective remedy where agency delay is caused by factors outside of the agency's control. In such instances, however, an enforcement bar would do nothing to speed the process. In other words, where mandamus suits would be ineffective, an enforcement bar would also be ineffective. Thus, the enforcement bar proposed by General Motors would not further the state interest in prompt EPA review beyond the remedy already provided. It would serve only to threaten the public interest in enforcing the existing SIP in circumstances where the delay was caused by factors beyond the agency's control.[18/]

18/ The enforcement bar might in fact delay, not prompt, EPA review. Without an enforcement bar, affected companies will be induced to keep pressure on EPA to act quickly. With such a bar, this incentive is removed.

III. Any Unfairness to General Motors Caused By EPA's Delay Can Be Remedied Without An Enforcement Bar.

Given the plain language of the statute, General Motors must have known that the existing SIP provisions remained in effect until EPA approved the revision. Yet, the company declined to pursue the mandamus remedy that was available to it. Instead, General Motors knowingly chose to violate the existing SIP provisions and thereby to assume the risk of federal enforcement.[19/]

19/ Under the undisputed facts, General Motors violated the terms of the existing SIP even during the four month period given to EPA to review the proposed revision. Joint Appendix at 19, 79. General Motors does not and cannot argue that the public interest would have been served by an enforcement bar during this period.

This is not to say that EPA's tardiness is irrelevant to the District Court's assessment of any penalties. General Motors has presented a number of case-specific factors, of varying degrees of merit, that argue for a reduction of the amount of penalties to be assessed. Under the First Circuit's opinion, however, General Motors will have every opportunity to raise these factors in District Court and to argue that the Court, in its discretion, should reduce the penalty accordingly. See 876 F.2d at 1068-69. See generally, United States v. Ven-Fuel, Inc., 758 F. 2d 763-64 (1st Cir. 1985)(always within the discretion of the trial court to determine whether penalties, given facts of a particular case, are warranted).

General Motors is dissatisfied with leaving the setting of the penalty to the discretion of the District Court. Instead, it argues for an enforcement bar under which, the day the four month period elapses without EPA decision, a polluter would be free to begin violating the existing SIP without fear of any penalty. There is no language in the statute that supports General Motors' understandable desire to escape even the possibility of penalties. To the contrary, as discussed above, the statute explicitly mandates that knowing violations of any provision of the existing SIP be subject to punishment. A per se rule precluding penalties against companies that knowingly violate existing SIP provisions would mock governmental enforcement efforts and diminish the regulated community's respect for

compliance with the act.[20/]

Clearly there will be circumstances where a company in compliance with a proposed SIP revision should be penalized for violating the terms of the existing SIP. This would be the case, for example, where the polluter had reason to

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20/ This follows regardless of the underlying merits of the proposed SIP revision. That is, even where EPA eventually approved a SIP revision, a company should not be shielded from penalties for violating existing law in the interim period. Under analogous circumstances, courts have long held that court orders must be obeyed even where the order was improperly issued. See e.g., Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967)(parties who knowingly violate a court order may not challenge the underlying validity of the order in contempt of court proceeding). Accordingly, there should be no per se rule against the imposition of penalties even where the proposed SIP provision was "approvable." To this extent, Duquesne Light Co. v. EPA, supra, 698 F.2d at 472, was wrongly decided.

doubt that the SIP provision would be approved.[21/] In the case at hand, General Motors continued to violate the existing SIP after it had been informed that EPA had made a preliminary determination to deny the proposed revision. Joint Appendix at 19, 91-96.

Whether or not penalties were assessed in particular circumstances, the threat of penalties is essential to governmental enforcement efforts. General Motors' proposed enforcement bar

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21/ Another circumstance that can arise is where the SIP revision is ultimately and untimely denied, but where the result could not have been predicted either way. The question would then become whether the uncertainty should benefit the public (through allowing enforcement actions to ensure compliance with the existing SIP) or industry (through an enforcement bar until denial of the revision). Given the purposes of the Clean Air Act, the uncertainty should be resolved in favor of the public. Cf. Train, supra, 421 U.S. at 92 (appeal of denial of SIP revision "carried out on the polluter's time, not the public's").

would shield one who knowingly violated federal law from facing even the threat of penalties. This proposed rule is unnecessary and inappropriate, and the Court should decline to adopt it.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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